No. 7 Orig.

State of Crow v Schnur

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Complt. (On demurrer)

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 28, 1900.

No. 7, Original.

THE STATE OF MISSOURI, COMPLAINANT,

vs.

THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, DEFENDANTS.

BRIEF AND ARGUMENT OF COMPLAINANT IN OPPOSITION TO JOINT DEMURRER OF DEFENDANTS TO BILL OF COMPLAINT.

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Attorney General of Missouri.

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In the Supreme Court of the United States.

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On the 17th day of January, 1900, the State of Missouri, by its Attorney General and Counsel, moved this Court for leave to file a bill of complaint against the State of Illinois, and the Sanitary District of Chicago, a public corporation and political subdivision of the State, the general object and purpose of which bill is to enjoin the defendants from discharging the undefecated sewage and noxious filth of the Sanitary District, composed in part of the City of Chicago and in part of the County of Cook, into the Mississippi River by artificial methods, across and through a natural divide or water

shed separating the basin of Lake Michigan from the basin of the Mississippi.

The bill is signed in the name of the State of Missouri by its Governor, and is verified by him.

The bill charges that unless the relief sought is granted the water of the Mississippi, which is used for drinking and other domestic purposes by many thousands of inhabitants of the State, and upon which they are compelled to rely for their supply, will be polluted and rendered unfit for use for primary purposes, and that the public health will be endangered; that the water will also be rendered unfit for watering cattle and stock, and that besides great quantities of filth will be deposited on the bed and soil of the river within the jurisdiction of and belonging to the complaining State, thereby changing its formation and creating a continuing public nuisance.

A brief was submitted in support of the motion for leave to file the bill, and on January 22, 1900, leave was granted and the bill was filed.

To the bill defendants have interposed a demurrer setting forth seven specific grounds in support thereof. The first six, however, may properly be regarded together, for they merely repeat, in various forms, the same objection, that this Court has no jurisdiction in the cause. The substance of this objection is that the State of Missouri is not the substantial, the real party to the complaint, but is merely lending its name to a cause which should be instituted and prosecuted by the various cities and towns along the river, or by the inhabitants residing along its bank and dependent upon its water supply, and that since they would have no standing in an original proceeding in this court, the complainant can have none. In other words, that Missouri is not the real party in interest.

The seventh ground of demurrer is that even though this court will take jurisdiction the averments of the bill are insufficient to constitute an equitable cause of action or to warrant the relief prayed.

For the convenience of the court the bill and demurrer, omitting formal parts, are here set forth:

BILL OF COMPLAINT.

"The complainant, The State of Missouri, and one of the States of the United States, brings this its bill of complaint against The State of Illinois, one of the States of the United States, and The Sanitary District of Chicago, a public corporation, organized under the laws of the State of Illinois, and located in part in the city of Chicago and in the county of Cook, in said State of Illinois, and a citizen of the State of Illinois.

And your orator complains and says that it is a State containing a population of upwards of three millions of people, and lying on the west bank of the Mississippi river, a public, navigable and running stream, and having a frontage on said stream of over four hundred miles.

And your orator shows that by the act of Congress providing for the organization and admission of Illinois and Missouri as States of the Union it was declared that the western boundary of Illinois and the eastern boundary of Missouri should be the middle of the main channel of the Mississippi river; that the shores of the Mississippi river, where its waters form the Missouri and Illinois boundary, and the soil under the waters thereof were not granted by the Constitution to the United States, but were reserved to the States of Illinois and Missouri respectively.

And your orator shows that the States of Missouri and Illinois each have concurrent general jurisdiction over the waters of the Mississippi river forming the boundary between them, and each of said States has exclusive territorial jurisdiction over that portion ad-

jacent to its own shore, and your orator shows that the Illinois river empties into the Mississippi river at a point above the city of St. Louis, on the Illinois side of said Mississippi river.

And your orator further shows that within the territory of your orator and on the banks and shores of said Mississippi river and below the mouth of the Illinois river are many cities and towns in the State of Missouri, and many thousands of persons who are compelled to and do rely upon the waters of said river, in their regular, natural, and accustomed flow, for their daily necessary supply of water for drinking and all other domestic and agricultural and manufacturing purposes, and for watering stock and animals of all kinds, and that said Mississippi river has been flowing in its regular course and has been used for the purposes aforesaid by the inhabitants of the said State of Missouri for a time whereof the memory of man runneth not to the contrary, and that said river and its waters and the use thereof for drinking, agricultural, and manufacturing purposes, in their accustomed and natural flow, are indispensable to the life and health and business of many thousands of the inhabitants of the State of Missouri and of great value to your orator as a State.

And your orator shows that cities and towns below the mouth of said Illinois river, within the territory of your orator, do and are compelled, by means of water works, water towers, and intakes, built and constructed for that purpose, to supply the inhabitants of said cities and towns with an adequate supply of pure and wholesome water, fit and healthful for drinking and all other domestic purposes and uses, from the said Mississippi river so flowing in its ancient, accustomed and natural course.

And your orator shows that said water-works systems are constructed with reference to said Mississippi river and for the purpose of taking water therefrom and not from any other source.

And your orator shows that heretofore, to wit, in 1889, the State of Illinois enacted a law known as the

Sanitary District act, together with an act for the improvement of the Illinois and Des Plaines rivers, and that under said act of said State the said corporation known as the said Sanitary District of Chicago was organized and is now existing and operating, and that by the express terms of said act any canal or drain corporation organized in accordance with its provisions may have conditions, restrictions, or additional requirements placed on said corporation; or the act authorizing the creation of said corporation may be amended or repealed, and that by the express provisions of said act, before any water or sewage shall be admitted into any channel constructed under said act, the trustees of said channel shall notify the governor of Illinois of the completion of said channel, and the governor of Illinois shall appoint three commisisoners to examine said canal or channel and report to the governor if the same complies with the act of the State of Illinois; and if it does, the governor shall authorize the water and sewage to be turned into said channel; and that without the said permit it cannot be so turned in; and that by the general provisions of said act said channel is at all times subject to the control and supervision of the State of Illinois and her authorities.

And your orator further shows that the Chicago river is situated in the basin of Lake Michigan and has two forks or branches flowing through the city of Chicago and into Lake Michigan, and that the natural drainage of Chicago, Illinois, is into Lake Michigan, and the sewage and drainage of the territory embraced in the defendant's district, The Sanitary District of Chicago, is led into or flows into the Chicago river and Lake Michigan.

And your orator further shows that the defendant herein, The Sanitary District of Chicago, with the authority of the State of Illinois, and acting as a governmental agency of said state, and under the supervision and control and subject to the approval of the State of Illinois, has constructed a channel or open drain from the west fork of the south branch of the

Chicago river, in the city of Chicago and county of Cook, in the State of Illinois, to a point near Lockport, in the county of Will, in said state, where said channel or drain connects with and empties into the Des Plaines river, which empties into the Illinois river, and which latter river flows and empties into the Mississippi river at a point distant about forty-three miles above the city of St. Louis, Missouri.

And your orator further states that the channel built by the Sanitary District of Chicago was so built by said Sanitary District as one of the governmental agencies of the State of Illinois, and by the pretended lawful authority of said state, and under the direction, supervision, and control and governmental power of the State of Illinois, and which said state has heretofore at all times sanctioned and now, through its governor and other officers, sanctions the building of said channel and opening thereof.

And your orator further shows that in the construction of said channel or drain the defendant The Sanitary District of Chicago, Illinois, with the sanction and approval of the State of Illinois, cut through the natural ridge or water-shed which divides the basin of Lake Michigan from the basins of the Des Plaines and Illinois rivers and the basin of the Mississippi river, and that having so constructed said channel and having about completed the same, and having, under the supervision of and with the sanction of the State of Illinois, extended said artificial channel through said natural divide of the water-shed, the defendants now propose and threaten to receive into said channel or drain the sewage matter and filth of the Sanitary District of Chicago, which embraces nearly the whole city of Chicago and a portion of the county of Cook, and, without any legal authority so to do, has already in part effectuated its said threat and purpose and threatens to permit and to cause said sewage and filth, by artificial means of pumping and otherwise, to flow through the channel or drain towards and into the said Des Plaines river and eventually into the Missis-

sippi river, thereby, with the approval of and subject to the inspection and control and supervision of the State of Illinois, and by the pretended authority thereof, reversing the natural flow of said Chicago river.

And your orator further shows that the sewage matter and poisonous filth which it is thus threatened to receive and to permit and to cause to flow through said artificial channel into said Des Plaines river, is that which is created by a population of upwards of one and one-half millions of people, besides that which is created by a great number of stock yards, slaughtering establishments, rendering establishments, distilleries, and other business enterprises and industries lining both sides of the Chicago river, producing filth and noxious matters; all of which are there discharged into the said Chicago river or drained therein from the surface.

And your orator further shows that for many years past the said city of Chicago, the greater portion of which is embraced in the limits of the defendant corporation, The Sanitary District of Chicago, as aforesaid, has been discharging its sewage matter and filth into the Chicago river and into Lake Michigan in such large quantities that much of it has accumulated in the bed and along the sides of the river and upon the bed of said Lake Michigan, near the shores thereof, and that the plan threatened and attempted now to be adopted by the defendant The Sanitary District of Chicago, acting in conjunction with and subject to the control of the defendant, The State of Illinois, and by the pretended authority of the said State of Illinois, will loosen said accumulated matter and filth, and will also direct it and cause it to flow towards and into said artificial channel or drain, and thence into said Des Plaines river, and finally into the Mississippi river and into the waters thereof within the jurisdiction and under the control of your orator and pass the homes of the inhabitants of your orator and the towns and cities within the borders of your orator, and past the water

works of said cities and towns within the State of Missouri.

And your orator further shows that the amount of said undefecated filth and sewage and poisonous and unhealthful and noxious matters proposed to be, and now about to be, permitted to be turned into said artificial channel and through said Des Plaines and Illinois rivers into the Mississippi river from the said Sanitary District of Chicago by the defendants, acting jointly, will amount daily to about fifteen hundred tons, and that if defendants should be permitted to carry their said threats into execution, and should cause said above amount of undefecated sewage and other poisonous and noxious matters, which would otherwise flow into Lake Michigan, to flow into the Mississippi river, that the waters of the Mississippi river within the jurisdiction of your orator will of a certainty be poisoned and polluted and rendered wholly unfit and unhealthful for drinking and domestic uses, and will render wholly valueless and entirely worthless the various water-works systems of towns and cities on the borders of the State of Missouri, established and acquired at great cost and expense, and will deprive your orator, The State of Missouri, and its inhabitants, of the right to the use of the waters of said river for drinking and all other domestic and manufacturing and agricultural purposes, as said water has been so used in its accustomed and natural flow heretofore for the length of time that the memory of man runneth not to the contrary thereof.

And that said threatened action of the defendants will amount to a direct and continuing nuisance and be an interference with the use by your orator and its inhabitants of the waters of the Mississippi river flowing in their natural state, polluting and poisoning the same by the means aforesaid, whereby the health and lives of the inhabitants of your orator will be endangered and the business interests of said state will be greatly and irreparably injured, and which said damage to the lives and health and the business interests

of said state resulting from said poisoning and polluting of said waters, as aforesaid, to your orator cannot be estimated in money value.

And your orator on information and belief states and charges the fact to be that said fifteen hundred tons of poisonous undefecated filth and sewage of said Sanitary District of Chicago will be daily carried through said artificial channel and sent through the Des Plaines and Illinois rivers into the Mississippi, and great quantities thereof will be deposited in the bed and soil of said river belonging to your orator and wholly within the jurisdiction thereof, to your orator's great and irreparable damage, and that the fifteen hundred tons of undefecated sewage and filth now about to be daily injected into the waters of the Mississippi river and into the portion thereof over which the State of Missouri has jurisdiction, and from which thousands of her inhabitants obtain drinking water, will pollute and poison the said water of the Mississippi river to such an extent as to render it unwholesome and unfit and unhealthful for use for drinking by the said inhabitants in the territory of your orator and unfit for use for watering stock and for manufacturing purposes.

And your orator further shows that great quantities of undefecated sewage turned into the Mississippi river in the manner and by the means aforesaid will poison and pollute said water with the germs of disease of various and many kinds. And your orator further shows that the acts herein complained of on the part of the State of Illinois, acting in conjunction with one of her governmental agencies, the said Sanitary District of Chicago, will cause a continuing nuisance in the Mississippi river, and that the said State of Illinois has no power or authority to cause or permit or assist in causing the commission and continuance of a nuisance in the flowing waters of the Mississippi river, a navigable stream, to the detriment and irreparable and continuing damage and injury of the State of Missouri, and the continuing and irreparable injury to the lives and health of the citizens and inhabitants of the State of Missouri, and that unless restrained by

the order and decre of this court the defendants, The State of Illinois and The Sanitary District of Chicago, acting together, will, in accordance with the terms of the act under which said sanitary district is organized, upon the permit and authority of the Governor of Illinois and of the State of Illinois, turn said water and sewage aforesaid, by the maner and means aforesaid, into the Des Plaines and Illinois rivers and thence into the Mississippi, all of which your orator says and avers is contrary to equity and good conscience, and would result in the manifest and irreparable injury of your orator and the health of her citizens in the premises, and your orator is wholly without remedy at law and without any adequate remedy to prevent the flowing of said sewage, as aforesaid, save by the interposition of this court.

Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed, and to the end that the defandants may make a full, true, direct, and perfect answer to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and to the end that the defendants, their officers, agents, servants, and employes, may be restrained by injunction issuing out of this court from receiving or permitting any sewage to be received or discharged into said artificial channel or drain, and from permitting the same to flow or causing the same to be made to flow through said channel or drain towards and into the Des Plaines river, your orator prays that your honors may grant a writ of injunction, under the seal of this honorable court, properly restraining and enjoining the defendants, the officers, agents, employes, and servants of the Sanitary District of Chicago and the State of Illinois, from permitting or causing any of said sewage to be discharged into said channel or drain, and from permitting or causing said sewage and poisonous filth thence to flow into said Des Plaines river; that defendant The State of Illinois be enjoined and restrained from issuing to its codefendant

permission and authority to do and perform the acts aforesaid or to allow them to be done; and your orator also prays for a provisional or temporary injunction pending this cause, restraining and enjoining the several acts aforesaid, and for such other and further relief as the equity of the case may require and to your honors may seem meet."

DEMURRER.

"Defendants, according to the statute in such case made and provided, state and show to the Court here the following causes of demurrer to the said Bill of Complaint:

First. That this Court has no jurisdiction of either the parties to, or of the subject matter of, this suit, because it appears upon the face of said bill of complaint that the matters complained of, as set forth therein, do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Missouri and the State of Illinois, or any of its citizens.

Second. That the matters alleged and set forth in said bill of complaint show that the only issues presented therein arise, if at all, between the State of Illinois and a public corporation created under the laws of said State, and certain cities and towns, in their corporate capacity as such, in the State of Missouri, and certain persons in said State of Missouri, residing on or near the banks of the Mississippi river, and which matters so stated in said Bill of Complaint, if true, do not concern the State of Missouri as a corporate body or State.

Third. That said Bill of Complaint shows upon its face that this suit is in fact for and on behalf of certain cities and towns in said State of Missouri, situate on the banks of the Mississippi river, and certain persons who reside in said state on or near the banks of said river; and that, although the said suit is attempted to be prosecuted for and in the name

of the State of Missouri, said State is, in effect, loaning its name to said cities and towns and to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said cities and towns in their corporate capacity as such, and said private persons or citizens of said State.

Fourth. That it appears upon the face of said Bill of Complaint, that the said State of Missouri, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of certain cities and towns in said State, in their corporate capacity as such, and of certain private citizens of said State, while under the Constitution of the United States and the laws enacted thereunder, the said State possesses no such sovereignty as empowers it to bring an original suit in this Court for such purpose.

Fifth. That it appears upon the face of said bill of complaint, that no property rights of the State of Missouri are in any manner affected by the matters alleged in said bill of complaint; nor is there any such property right involved in this suit as would give this Court original jurisdiction of this cause.

Sixth. That in order to authorize this Court to maintain original jurisdiction of this suit as against the State of Illinois, or against any citizens of said state, it must appear that the controversy set forth in the bill of complaint and to be determined by this Court, is a controversy arising directly between the State of Missouri and the State of Illinois, or some of its citizens, and not a controversy in vindication of the alleged grievances of certain cities and towns in said state or of particular individuals residing therein.

Seventh. That said bill of complaint is in other respects uncertain, informal and insufficient, and that it does not state facts sufficient to entitle the said State of Missouri to the equitable relief prayed for in said bill of complaint."

BRIEF.

I.

The Supreme Court of the United States has original jurisdiction of all cases in which a State is a party.

Constitution of the United States, Art. III. Section 2.
Georgia v. Brailsford, 2 Dall. 402;
Fowler v. Lindsey, 3 Dall. 411;
Rhode Island v. Massachusetts, 12 Pet. 657;
Virginia v. West Virginia, 11 Wall. 39;
Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518;
Florida v. Anderson, 91 U. S. 667;
Wisconsin v. Duluth, 96 U. S. 381;
Wisconsin v. Pelican Insurance Co. 127 U. S. 265;
Virginia v. Tennessee, 148 U. S. 503;
Louisiana v. Texas, 20 Sup. Ct. Rep. 251.

The only exception made by the Eleventh Amendment is that denying jurisdiction in actions *against* States by *citizens* of another State, or citizens or subjects of any foreign State.

Amendment XI. to Constitution;
Chisholm v. Georgia, 2 Dall. 419;
Hollingsworth v. Virginia, 3 Dall. 378.

It is conceded that to justify such original jurisdiction the cause must be one in which the State is the real, substantial party, seeking to enforce a right of its

own. Where the suit, though in the name of the State, is in the interest of others, jurisdiction will not obtain.

New York v. Louisiana, and
New Hampshire v. Louisiana, 108 U. S. 76;
Louisiana v. Texas, (Decided at this term, January 15, 1900), 20 Sup. Ct. Rep. 251.

II.

A public nuisance affecting the health or safety of a community may be abated by the State, by indictment or by information. Or, the State in the discharge of its duty and the exercise of its power to protect the public health, may resort to a court of equity for the more complete and adequate suppression of such nuisances by injunction. The bill in such case may be filed by the Attorney General, or other law officer of the State, in its name or in his. The right of the State to maintain such equitable action has been recognized in the following cases, which establish the proposition that such an action is one in which the State is the substantial, the real and the proper party complainant, and that the controversy is its controversy.

Indiana v. Ohio Oil Co., 150 Ind. 21, (Affirmed in this Court April 9, 1900.)
Mugler v. Kansas, 123 U. S. 623;
Georgetown v. Alexandria Canal Co., 12 Pet. 91;
Attorney General v. Jamica Pond Aqueduct Co. 133 Mass. 361;
Attorney General v. Tarr, 148 Mass. 309;
People v. Truckee Lumber Co., 116 Cal. 397;
People v. Gold Run Co., 66 Cal. 152;
Attorney General v. Railroad Co., 27 N. J. Eq. 1;

Attorney General v. Cohoes Co., 6 Paige 133;
People v. St. Louis, 5 Gilm. (10 Ill.) 367;
Craig v. People, 47 Ill. 487;
State v. Mobile, 24 Ala. 701;
Attorney General v. Blount, 4 Hawks' R. (N. C.) 384;
United States v. Gear, 3 How. 120;
People v. Third Avenue Railroad Co., 45 Barb. 63;
Attorney General v. Hackney Board, L. R. Eq. 626;
Attorney General v. Leeds, L. R. 5 Ch. 583;
Atorney General v. Cleaver, 18 Ves. 217;
Attorney General v. Birmingham, 4 Kay & J., 528;
Conservators of River Thames v. Mayor, etc. of Kingston, 12 L. T. (N. S.) 667;
Attorney General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 147;
Attorney General v. Luton Board, 2 Jur. (N. S.) 180.

And such right of the State to proceed in its name, or in the name of its law officer, is also announced by the text writers.

High on Injunctions, Sec. 762;
3 Pomeroy's Eq. Jur., Sec. 1349;
Parker & Worthington on Public Health and Safety, Sec. 218;
Angell on Highways, Sec. 279;
Eden on Injunctions, 259;
1 American & English Encyc. (2 ed.) pp. 71-73.

And the same principle is announced in many cases where cities and towns have been allowed to maintain bills to restrain public nuisances under grants of power from the State. In all these cases the right of the State to appeal to equity is declared, and the municipal corporation is permitted to proceed as an agency of the State and by virtue of the delegated power.

Village of Pine City v. Munch, 42 Minn. 342;
City of Demopolis v. Webb, 87 Ala. 659;
City of Huron v. Bank of Volga, 8 S. Dak. 449;
City of Belton v. Central Hotel Co. (Tex. Civ. App.), 33 S. W. 297;
City of Belton v. Baylor Female College (Tex. Civ. App.), 33 S. W. 680;
City of Llano v. County of Llano, 5 Tex. Civ. App. 133; s. c. 23 S. W. 1008;
City of New Castle v. Raney, 130 Pa. St. 564;
American Furniture Co. v. Town of Batesville, 139 Ind. 77;
Cheek v. City of Aurora, 92 Ind. 107;
Mayor, etc., of London v. Bolt, 5 Ves. 129;
Watertown v. Mayo. 109 Mass. 315;
Trustees of Watertown v. Cowen, 7 Paige Ch. 510;
Winthrop v. Farrar, 11 Allen (Mass.) 398;
Attorney General and Inhabitants of Tarborough v. Blount, 4 Hawks' Rep. 384;
City of Springfield v. Robberson Avenue R'y Co., 69 M. A. 514;
Town of Ravenswood v. Flemings, 22 W. Va. 52;
Inhabitants of Greenwich v. Railroad, 24 N. J. Eq. 217;
Williams v. Smith, 22 Wis. 594, 600;
Mayor, etc. v. Thorne, 7 Paige 261;
City of Eau Claire v. Matzke (Wis.), 56 N. W. 874;
Dillon's Mun. Corp., Sec. 405, Note 2, p. 473; Sec. 379;

Parker & Worthington on Public Health and Safety, Secs. 217, 218;
Wood on Nuisances, Sec. 777, Note 1, p. 1120; Secs. 785, 789;
3 Pom. Eq. Jur., Sec. 1349;
1 High on Inj. (2 Ed.), Secs. 768, 769;
6 Lawson's Rights, Remedies and Practice, Sec. 2972, p. 4838;
1 Am. & Eng. Encyc. (2 Ed.), "Abatement of Nuisances," p. 74.

III.

The bill contains averments sufficient to entitle the State of Missouri to the relief prayed, if those averments are hereafter shown to be true.

A municipal corporation, though authorized by statute to maintain a system of sewerage, cannot thereby justify the pollution of a running stream. The maintenance of such a nuisance cannot be legalized. On the contrary, injunction lies to prevent it at the suit of the State, or of any person specially damaged.

Camichael v. City of Texarkana, 94 F. R. 561 (May 8, 1899);
City of Jacksonville v. Lambert, 62 Ill. 520;
Robb v. Village of La Grange, 158 Ill. 21;
Village of Dwight v. Hayes, 150 Ill. 273;
Barrett v. Greenwood Cemetery Association, 159 Ill. 385;
Peterson v. City of Santa Barbara, 119 Cal. 387;
People ex rel. Lind v. City of San Louis Obispo, 116 Cal. 617;
People v. Truckee Lumber Co., 116 Cal. 397;
Morgan v. City of Danbury, 67 Conn. 484;
Joplin Consol. Mining Co. v. City of Joplin, 124 Mo. 129;

Franklin Wharf Co. v. City of Portland, 67 Me. 46;
Richardson v. City of Boston, 19 How. 263;
Chapman v. City of Rochester, 110 N. Y. 273;
Attorney General v. Leeds, L. R. 5 Ch. 583;
Goldsmid v. Tunbridge Wells, L. R., 1 Eq. Cas. 161;
Attorney General v. Hackney Board, L. R., 20 Eq. 626;
Conservators of River Thames v. Mayor of Kingston, 12 L. T. (N. S.), 667;
Attorney General v. Birmingham, 4 Kay & J. 528;
Watson v. City of Toronto, 4 Upper Can. R. 158;
Gould on Waters (2 Ed.), Secs. 545-546;
2 High on Injunction, Secs. 794-795;
Dillon's Mun. Corp. (4 Ed.), Sec. 1047;
Wood on Nuisances, Secs. 428-429.

IV.

In a proceeding to enjoin the pollution of a water course the right of the plaintiff, rather than the inconvenience of the defendant, is the question to be considered; even thought the latter represents a large population. The small village need not suffer a nuisance that a large city may be benefited.

Attorney General v. Birmingham, 4 Kay & J. 528.

Nor is it necessary in a proceeding to abate a public nuisance to aver or prove actual damage to the public.

Attorney General v. Birmingham, *supra*;
Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335;
Wood on Nuisances (3 Ed.), Sec. 442.

Nor will the rights of parties in cases of this kind be determined by the "*balance of injury.*" The continuance of a nuisance will not be sanctioned because the plaintiff's damage is inconsiderable, or because an injunction might cause great loss or expense to the wrong-doer.

Suffolk Gold M. & M. Co. v. San Miguel M. & M. Co., 48 Pac. 828 (Colo. Ct. App., April 26, 1897).
Higgins v. Water Co., 36 N. J. Eq. 538;
Goldsmid v. Tunbridge Wells, L. R., 1 Eq. 161;
Evans v. Fertilizing Co., 160 Pa. St. 209;
Attorney General v. Colney Hatch Lunatic Asylum, L. R., 4 Ch. App. 147;
Wood on Nuisances, Sec. 435.

"The fact that a large population will be affected by an interruption of the use of a system of sewers is immaterial where the rights of an individual are invaded. The inconvenience is one of the public's own creation and should be borne by it rather than the individual."
Gould on Waters, Sec. 546.

V.

It is no excuse for one befouling a stream to show that others are also doing so. Each may be enjoined against the commission of the wrong.

Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335;
Chipman v. Palmer, 77 N. Y. 51;
McKeon v. See, 51 N. Y. 300;
Morgan v. City of Danbury, 67 Conn. 484;
Crossley v. Lightowler, L. R. 3 Eq. Cas. 279;
Wood on Nuisances, Sec. 435.

VI.

No right to pollute a stream can be acquired by delay or even by prescription.

Goldsmid v. Tunbridge Wells, L. R., 1 Eq. Cas. 161;
Attorney General v. Luton Board, 2 Jur. (N. S.) 180;
Chapman v. City of Rochester, 110 N. Y. 373;
Wood on Nuisances (3 Ed.), Secs. 428-431).

Nor will the fact that the preservation of the public health requires the sewage of a town to be removed justify its discharge into a running stream to the injury of others.

Wood on Nuisances (3 Ed.), Sec. 434;
Goldsmid v. Tunbridge Wells, L. R., 1 Eq. Cas. 161;
Attorney General v. Leeds, L. R., 5 Ch. 583.

Nor will the aid of equity be withheld because of the expensive or extensive character of the work which creates the nuisance.

Wood on Nuisances (3 Ed.), Sec. 802, p. 1183.

VII.

In determining the question of nuisance by the pollution of water, it is immaterial whether the causes producing it are near to or far removed from complainant; the simple question is whether the water coming to complainant has been impaired in value for ordinary domestic uses through the acts of defendant.

Wood on Nuisances (3 Ed.), Sec. 436, and Cas. ci.

ARGUMENT.

In the briefs submitted on the part of defendants a number of questions are referred to which it is not deemed necessary or proper to discuss at this time. The only matters for present consideration are two. Has this court jurisdiction? Does the bill contain averments sufficient to constitute an equitable cause of action? The determination of the first of these questions depends upon whether or not the grievances set forth in the bill are such as the State of Missouri may justly complain of in her own right. That is, do they concern her as a state. If they do, then she is the real, the substantial, the proper party complainant, and the jurisdiction of this court will not be denied her. If, on the other hand, it be true, as contended by defendants, that the subject-matter of the bill affects only certain cities and towns, or certain inhabitants of the state; and that they, and they alone, can work out their own redress; that the state, in her character as such, cannot intervene or take up their wrongs, then the bill must fail.

ORIGINAL JURISDICTION.

Section 2 of Article III of the Constitution of the United States in express language gives this court original jurisdiction of all cases in which a state shall be a party. Amendment XI to the Constitution merely withdraws the Federal judicial power in cases *against* a state by the *citizens* of another state, or by citizens or subjects of a foreign state, and in no way affects the question here involved.

Under this grant of jurisdiction this court has repeatedly exercised its power and taken original cognizance of controversies between states, or controversies by a state against citizens of other states. The cases in which this has been done will be found collected under Point I of this brief, and it is not believed necessary to refer to them in detail here. Naturally the most ordinary instances of controversies between the states are those arising from disputed boundary questions, but this court has never undertaken to limit its original jurisdiction to controversies of that character, or hesitated to assume jurisdiction in disputes of other kinds. Notable examples, in this respect, are the cases of Georgia v. Brailsford, 2 Dall. 402; Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, and Florida v. Anderson, 91 U. S. 667.

These propositions, indeed, are not controverted by defendants, and their discussion need be no further extended. They maintain, however, that the case disclosed by the bill brings it within the doctrine of the cases of New York and New Hampshire v. Louisiana, 108 U. S. 76, in which the two former states, as assignees of certain obligations of Louisiana, held by their citizens, attempted for their use and benefit, attempted to maintain an original suit here against the latter State; and Louisiana v. Texas, decided at this term, on January 15, 1900 (20 Sup. Ct. Rep. 251), in which the first named state undertook to champion and protect the mere material, the mere commercial or business interests of certain of her citizens against quarantine regulations of the defendant state.

In each of these cases jurisdiction was properly denied because the State was not, in either, the real or proper party complainant. Had these suits been in-

stituted in the names of the substantial parties no pretense of original jurisdiction in this court could have been urged.

Of the wisdom of that provision of the Constitution which gives this court original jurisdiction in proper cases between states, and where the state is a party plaintiff against a citizen of another state, so much has been said that nothing can or need be added. Under the Constitution the States cannot make war upon each other and settle their differences by force of arms, nor was it deemed compatible with the dignity of the sovereign State that she should be compelled to enter the courts of another State as a suitor against one of the latter's citizen. However viewed the jurisdiction thus given this court is one which must commend itself generally. Without it serious disturbances would inevitably result.

THE STATE OF MISSOURI MAY RESORT TO EQUITY FOR THE SUPPRESSION OF A CONTINUING PUBLIC NUISANCE, AND THIS COURT THEREFORE HAS JURISDICTION OF THIS CAUSE.

While it is contended by defendants that the bill is not sufficient in all its necessary and essential averments, it appears to be conceded that it does recite a case of public nuisance. The argument is made, however, that the complainant is not without legal remedy and the suggestion is advanced that the nuisance complained of could be abated by indictment. Just how the State of Missouri could indict the Sanitary District of Chicago, a municipal corporation of Illinois, is not made clear, but if this difficulty could be overcome; if instead of a public corporation, the wrong-doer were a private individual, relief by indictment would be im-

possible. The bill shows that the work of pollution is begun beyond the territory and jurisdiction of Missouri. She could therefore not indict.

An indictment at common law could not be sustained in the Federal courts of the United States against the Sanitary District for maintaining a nuisance, because no such proceeding has been authorized by Congress.

> Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518.

The suggestion of indictment, therefore, is without value or merit.

But the State of Missouri is not without relief. It is her right, as it is her duty in the protection of public health and safety, to appeal to a court of equity for assistance. And this a state may do, as we will show, in the case of a continuing public nuisance, even where indictment or information may be resorted to. This on the obvious ground that the legal remedies are inadequate. They deal merely with the existing, but cannot arrest the future effects of a running nuisance. They may punish, but they can not retard the progress of the nuisance.

A nuisance, it may be premised to be "*public*" need not affect *all* the members of a community. It is such if it annoys or inconveniences or injures a large class of the community, or such portion of it as necessarily comes in contact with it. Wood on Nuisances (3 Ed.), Sec. 20; Lansing v. Smith, 8 Cow. (N. Y.) 146; Hackney v. State, 8 Ind. 494; Attorney General v. Sheffield Gas Co., 3 DeG. M. & G. 304; Soltan v. DeHeld, 2 Sim. (N. S.) 142. "A 'public' nuisance does not necesarily mean one affecting the government or the whole community of the state. Very few nuisances are thus extended in

their effect. It is 'public' if it affects the surrounding community generally, or the people of some local neighborhood." Pine City v. Minch, 42 Minn. 342.

In the case at bar the bill recites in effect that the State of Missouri has a frontage of over four hundred miles upon the west bank of the Mississippi River, a public, navigable and running stream; that she owns and has jurisdiction to the middle of the main channel of the stream; that along the shores of the river are many of her cities and towns, and many thousands of her inhabitants, who for time immemorial have relied, and are compelled to rely, upon the waters of the river in their regular, natural and accustomed flow, for their daily necessary supply of water for drinking and all other domestic purposes, and for watering stock and animals; that a number of said cities have constructed waterworks systems with a special reference to said river, and for the purpose of taking water therefrom, and from no other source, and that their citizens are entirely dependent thereon. It is charged that the acts of defendants, if not restrained, will result in the forwarding, by *artificial* means, *and through an unnatural channel*, of 1500 tons of undefecated sewage daily, besides accumulated deposits in the bed of the Des Plaines and Illinois rivers, which it is averred will pollute the water supply whereon these many thousands are utterly dependent; will produce disease and sickness, and will affect that portion of the bed, or soil of the river within the territory of the complaining State. No stronger case of a threatened public nuisance, it is respectfully submitted, could be stated.

The Act of Congress admitting Missouri and Illinois as States, declared that the eastern boundary of Missouri and the western boundary of Illinois should be the middle of the main channel of the Mississippi

River. In the case of City of St. Louis v. Rutz, 138 U. S. 226, this court held that the two States have concurrent jurisdiction generally over the river, and that each State has exclusive territorial jurisdiction over that portion adjacent to its own shore. In England the title to the bed of all navigable streams was vested in the Crown, and to the rights of the English Sovereign the several States succeeded upon the establishment of American Independence. The shores of navigable waters, and the soil thereunder were not granted by the Constitution to the United States, but were reserved to the several States respectively. Pollard v. Hagan, 3 How. 212. It may be regarded as American law that the territorial sovereign, whether the State or the Federal government, is the owner in fee of the bed of all navigable streams within its limits. Pomeroy on Water Rights, Sec. 220; Scudder v. Trenton Falls Co., 1 N. J. Eq. 694.

Missouri holds the title to the soil under the Mississippi River to the center of the main channel, and has the absolute right to the unpolluted use of the water, subject to any rights which may have been surrendered to the Federal Government. Georgetown v. Alexandria Canal Co., 12 Pet. 91.

In the case of non-tidal waters the question of title to the bed, as between the State and the riparian owner, depends on whether the common law doctrine of navigability has been accepted or rejected by the particular State. At common law only those streams were deemed navigable in which the tide ebbed and flowed. In most States this is not the determining test, but the question is whether the stream is navigable in fact. Where the common law rule exists non-tidal streams are not regarded as navigable, even though actually so. The latter rule still prevails in Illinois, so that a rip-

arian owner along the Mississippi river in that State owns to the middle of the main channel of the stream. Barney v. Keokuk, 94 U. S. 324. In Missouri, on the other hand, where the old common law rule does not obtain, and where the Mississippi river is regarded as a navigable stream, the title to the bed to the middle of the channel is in the State. Benson v. Morrow, 61 Mo. 345; Hahn v. Dawson, 134 Mo. 581.

This being then the situation, and the State of Missouri being the owner of the soil of the stream, and being charged with the duty of protecting the health of her inhabitants, can she maintain this proceeding?

Under Point II of our brief we have referred the Court to some of the many cases which announce the right of the State to institute and maintain an action in equity for the more thorough and complete suppression of public nuisances. Many more might have been added but it was deemed unnecessary and only the strongest upon the question were selected. All of these cases, as well as the text writers cited, recognize this right of the State. We have also added an array of authorities permitting resort to equity by municipal corporations, where the power of abating nuisances within their limits has been delegated to them by the State, by charter or by general law. These cases are necessarily based upon the theory that the State itself could so proceed, and, possessing the right, might confer it upon its agencies or political subdivisions.

To some of the authorities we will now briefly refer:

In 1, HIGH ON INJUNCTION, (2 Ed.) Section 762, it is said that a private person may proceed by a bill in equity to restrain a public nuisance, provided he be able to show a special injury to himself, aside from and independent of the general injury to the public. And, it is added, "in the absence of such special and

peculiar injury sustained by a private citizen, he will be denied an injunction, leaving the public injury to be redressed upon information, or other suitable proceedings, *by the Attorney General in behalf of the public.*"

"A court of equity has jurisdiction to restrain existing or *threatened* public nuisances by injunction, at the suit of the Attorney General in England, *and at the suit of the State or the people*, or municipality, *or some proper officer representing the commonwealth, in this country.*"

3 Pomeroy's Eq. Jur., Sec. 1349.

ANGELL ON HIGHWAYS declares, at Section 279, that the usual and ordinary remedy for the abatement of public nuisances is by indictment followed by fine and imprisonment, and by judgment requiring the removal of the nuisance.

At section 280 he adds:

"In addition to these more ordinary remedies it is now well settled that a court of equity may take jurisdiction of public nuisances by an information filed *by the Attorney General.* This jurisdiction is grounded upon the greater efficacy and promptitude of the remedies administered in courts of equity, enabling them to restrain such nuisances as are only threatened or in progress, as well as to abate such as already exist, to their final suppresion by perpetual injunction, to arrest irreparable mischief and prevent multiplicity of suits."

PARKER & WORTHINGTON in their comparatively recent treatise on PUBLIC HEALTH and SAFETY, at Sections 214 and 215, refer to the various methods of procedure for abating nuisances, such as by indictment, information or appeal to equity, and at Section

218 announce the rule respecting the latter remedy as follows:

"The ordinary and proper proceeding in equity to prevent or abate a public nuisance is by bill for injunction filed by the Attorney General or other proper law officer of the government *in the name of the people.* But the proceeding *may* be brought in the name of the inhabitants of the place within whose corporate limits the alleged nuisance is threatened or maintained."

In 1 AMERICAN & ENGLISH ENCYC., (2 Ed.) under the title "*Abatement of Nuisances*" at pages 71 to 73, many authorities are collected and the conclusion reached that:

"Where the nuisance is purely public proceedings in equity can be instituted *only by the State or the attorney general acting for the State.*"

Coosaw Mining Co. v. South Carolina, 144 U. S. 550, was a suit in equity brought by the State to enjoin the mining company from digging and removing phosphate rock and deposits from the bed of a navigable river within the territory of the State. It was contended that the State could not maintain such a proceeding. The judgment of this court affirmed, however, a decree awarded the State in the Circuit Court, and upheld its right to file and maintain a bill for injunction to restrain what was the equivalent of a nuisance. Many authorities are cited in the opinion of this court, declaring the right of a State, by its Attorney General, to proceed in equity for the suppression of a nuisance, in addition to its right to proceed by indictment, and that principle was held applicable to the case before the court for decision. The court quotes approvingly from EDEN ON INJUNCTIONS, the following:

"The usual, and perhaps the more correct, mode of

proceeding in equity in cases of public nuisances, is by information *at the suit of the Attorney General.*"

In the case of Indiana v. Ohio Oil Co., 150 Ind. 21, (affirmed here April 9, 1900) a bill was filed in behalf of and in the name of the State to enjoin the defendant corporation from wasting natural gas, on the ground that such conduct amounted to a public nuisance. A demurrer to the bill was interposed by defendant and sustained by the *nisi prius* court. This action was reversed by the Supreme Court of Indiana; where, on the question of the State's right to maintain the action, the court said:

"But the courts of the State and the United States are open to the State both in its sovereign and by virtue of its corporate rights, in both of which characters it sued here. Indiana v. Kentucky, 136 U. S. 479; State v. Portsmouth Savings Bank, 106 Ind. 435; State v. Adams Express Co., 144 Ind. 549; Adams Express Co. v. Indiana, 165 U. S. 255; State v. Chicago, etc., R. R. Co., 145 Ind., 229; State v. Union National Bank of Muncie, 145 Indiana 537; Western Union Telegraph Co. v. State, 146 Ind. 54; 23 Am. & Eng. Encyc. of Law, p. 80."

In the case of Attorney General v. Jamaica Pond Aqueduct Corporation, 133 Mass. 361, the proceeding was an information in equity in the Supreme Judicial Court, to enjoin the defendant from lowering the water in Jamaica pond, one of the public ponds of Massachusetts. It was claimed that the necessary effect of such lowering would be to impair the rights of the people in the use of the pond for fishing, boating and other lawful purposes, and to create and expose upon the shores of the pond a large quantity of slime, mud and offensive vegetation detrimental to the public health. The defendant demurred, insisting that no case was

stated which came within the equity jurisdiction of the court, and questioned the power of the Attorney General, on behalf of the Commonwealth, to maintain the proceeding.

The similarity betwen the case and that at bar will be at once noted. There was no averment by the Attorney General of any injury to the State, as such; and in view of the insistence here that the State cannot drink water, or use water for domestic purposes, and that therefore, in the absence of such allegation, no cause of action is averred in favor of the State, attention is directed to the fact that no averment was made in the Massachusetts case of any direct injury to the State, as a State. It was alleged, however, that the rights of the public in the pond for fishing, boating, and other privileges and pleasures, (which the State as an entity cannot enjoy,) were about to be affected and that the public health might be endangered.

Speaking through the Chief Justice the Court said:

"The cases are numerous in which it has been held that the Attorney General may maintain an information in equity to restrain a corporation exercising the right of eminent domain under a power delegated to it by the Legislature, from any abuse or perversion of the powers which may create a public nuisance or injuriously affect or endanger the public interests. Agar v. Regents Coal Co., Coop., temp. Eldon, 77; Attorney General v. Great Northern Railway, 1 Dr. & Sm. 154; Attorney General v. Mid-Kent Railway, L. R. 3 Ch. 100; Attorney General v. Leeds Corporation, L. R. 5 Ch. 583; Attorney General v. Great Eastern Railway, 11 Ch. D. 449; Attorney General v. Great Northern Railway, 4 DeG. & Sm. 75; Attorney General v. Cohoes Co., 6 Paige 133. The information in this case alleges not only that the defendant is doing acts which are *ultra vires*, and

an abuse of the power granted to it by the legislature, but also that the necessary effect of such acts *will be to create a public nuisance.* This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. *And when the nuisance is a public one an information by the Attorney General is the appropriate remedy.* This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance by partially draining the pond and exposing its shores, *thus endangering the public health.*"

It was also claimed by defendant in that case, as here, that resort to equity was unnecessary, because the law furnished a complete remedy by indictment or by the summary methods for the abatement of nuisances. The court meeting this suggestion said:

"The defendant contends that the law furnishes a plain, adequate and complete remedy for this nuisance by an indictment or by proceedings under the statutes for the abatement of a nuisance by the Board of Health. Neither of these remedies can be invoked until a part of the mischief *is done*, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts *before any mischief is done*, gives clearly a more efficacious and complete remedy.

There is another ground upon which in our opinion this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction, of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and like the tide waters and navigable streams are

under the control and care of the Commonwealth. The rights of fishing, boating, bathing and other like rights, which pertain to the public, are regarded as valuable rights entitled to the protection of the government. West Roxbury v. Stoddard, 7 Allen 158; Attorney General v. Woods, 108 Mass. 436; Commonwealth v. Vincent, 108 Mass. 441. If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, *it furnishes a proper cause for an information by the Attorney General to restrain and prevent the mischief.*"

In the case of Mugler v. Kansas, 123. U. S., 623, at page 673, this Court, speaking by Mr. Justice Harlan, after quoting approvingly from Sections 921 and 922, of Story's Equity Jurisprudence, the statement that public nuisances may be suppressed by the aid of equity, as well as by indictment, says:

"The grounds of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction, protect the public against them in future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subjects of new prosecutions or proceedings. This is a salutory jurisdiction, *especially where a nuisance affects the health, morals or safety of the community.* Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. District Attorney v. Lynn & Boston Railroad Co., 16 Gray,

242, 245; Attorney General v. New Jersey Railroad, 2 Green Ch., 139; Attorney General v. Tudor Ice Co., 104 Mass., 239, 244; State v. Mayor, 5 Porter (Ala.), 279, 294; Hoole v. Attorney General, 22 Ala., 190, 194; Attorney General v. Hunter 1 Dev. Eq., 12; Attorney General v. Forbes, 2 Myl. & Cr., 123, 129, 133; Attorney General v. Great Northern Railway Co., 1 Drew & Sm., 154, 161; Eden on Injunctions 259; Kerr on Injunctions (2 Ed.), 168."

In the case of Conservators of the River Thames v. Mayor, etc., of Kingston, 12 L. T. (N. S.), 667, it was said:

"Riparian owners and the public have the right to take water from navigable streams, and the pollution of such water so as to destroy its value for primary purposes, by letting into the same the sewage of the town is a nuisance, and the fact that the sewage has been sent there *for many years* does not give a prescriptive right to continue it when by the increase therein, it becomes a nuisance."

These authorities, it would seem, sufficiently establish the right of the State, in its character as such, to present to a court of equity a bill for the abatement of a public nuisance. *The matter is one which concerns the State itself.* The individual citizen who sustains peculiar or special injury, it is true, may assert his own rights and seek redress for his own particular wrongs; but the State, in her sovereign character, the State, as the very public itself, may initiate and prosecute a proceeding for the suppression of what amounts to and constitutes a public wrong, a wrong to the State itself.

The case of Louisiana v. Texas, recently decided, and upon which so much reliance is placed by defendants,

in no manner militates against the right of the State of Missouri to maintain this bill as an original proceeding in this court. That case, in fact, reaffirms the jurisdiction of the court in cases between States, or where a State is a party plaintiff; but it is held under the averments of the bill in that case that the controversy was not one affecting Louisiana in her own rights, or in respect of any duty which she owed her citizens. It is said by the Court that the bill in that case was an attempt, as in the cases of New York and New Hampshire v. Louisiana, to procure redress for alleged wrongs to individuals, when the individuals themselves would have had no standing here. In other words, it being claimed that the quarantine regulations of Texas were affecting injuriously the interstate commerce from New Orleans to Texas,to the damage of merchants of New Orleans, and to the corresponding business advantage of certain Texas towns and Texas merchants, and the State of Louisiana, undertaking to champion the cause of these merchants, her citizens, this court declined to entertain jurisdiction of the bill. The action of the Court was plainly put upon the ground that the controversy was not one in which the State of Louisiana, as a State, was interested. Speaking through the Chief Justice, this Court said:

"Inasmuch as the vindication of the freedom of inter-state commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way, because the matters complained of affect her citizens at large; nevertheless, if the case stated is not

one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained."

In this case, on the contrary, the cause of action is one in favor of the State itself. It is not only the State's duty, but the State's right, to abate a public nuisance, and this may be done by resort to equity in a proper case, as we have shown. The controversy here is one which *belongs* to the State, and means as much to the State as a controversy touching a boundary line. This is so on either of two grounds. It is so because of the right of the State, as such, to resort to equity for the suppression of a public nuisance, which affects sanitary conditions and menaces the health of her inhabitants (not their mere material interests), and because of the fact that the State, as proprietor of half the bed of the Mississippi River, subject only to the rights of navigation, is entitled to the use and flow of the water, in its natural condition of purity and volume. The bill not only avers the menace to health, but the probability of a change in the bed of the stream, by deposits of the filth proposed to be discharged into the river by the defendant, Sanitary District.

Mr. Justice Harlan, while concurring in the opinion in the Louisiana case, pointed out, in a separate opinion, that Louisiana was not charged with any duty in the particular premises, nor had she any power to regulate interstate commerce.

Mr. Justice Brown, also concurring, called attention to the fact that "the objection to the present bill is that it does not allege the stoppage of all commerce between the two States, but between the City of New Orleans and the State of Texas. The controversy is not one in which the citizens of Louisiana generally

can be assumed to be interested, but only the citizens of New Orleans; and it therefore seems to me that the State is not the proper party complainant."

The difference between that case and the case at bar is apparent. This case is one which the State unquestionably could maintain in her own courts, against one of her own citizens, within her jurisdiction, in the exercise of her power and duty to suppress and abate public nuisances, threatening the public health; and because she may do that, she may maintain a bill for that purpose in this court against a sister State, and one of its political subdivisions and agencies, beyond her own jurisdiction. The Constitution of the United States so intends.

It is claimed that because reference is made in the bill to cities and towns situated along the bank of the Mississippi River, and to inhabitants of Missouri living thereon, and to the fact that they will be injured by the pollution of the water upon which they are compelled to rely, that, therefore they, and not the State, are the only proper parties to maintain this proceeding. Substantially the same claim was made in the case of State of Florida v. Anderson, 91 U. S., 667, a proceeding to subject certain railroad property to the payment of bonds held by the State, and which were a lien upon the road. In that case certain public officers of the State constituted a board of trustees of the fund to which the bonds belonged. It was urged that they, as trustees, held the legal title; that they were the legally interested parties, and that, inasmuch as this fact appeared upon the face of the bill, this court had no jurisdiction of the cause brought here by the State.

Mr. Justice Bradley, after referring to these facts, and speaking for the court, said:

"Now to protect its interests it is competent for the State seeking equitable relief against the citizens of another State to file an original bill in this court. The reference to the trustees in the bill cannot affect the jurisdiction of the court, inasmuch as they are not litigants before it. It has frequently been decided in the circuit courts, where the jurisdiction depended upon the citizenship of the parties, that such jurisdiction is not ousted where there has been occasion to make a formal party of a sheriff or other public officer, by reason of his having a writ of execution, or being named as obligee in an official bond sued for the benefit of private parties, provided the real parties to the litigation have the requisite citizenship."

So in this case the cities and towns of Missouri on the Mississippi river, and the inhabitants of the State living along its bank, are referred to in the bill to show the public character and extent of the nuisance sought to be enjoined. No doubt they, as parties specially injured, could maintain independent bills in equity, but this does not deprive the State of its right to proceed on its own account. In the Florida case, the trustees might unquestionably have instituted proceedings in an inferior court, but that right did not lessen the authority of the State itself to proceed in this court.

THE AVERMENTS OF THE BILL ARE SUFFICIENT.

The alleged insufficiencies of the bill are not pointed out with much particularity by the defendants. The seventh ground of the demurrer is in the general language that:

"The said bill of complaint is in other respects uncertain, informal and insufficient, and that it does not state facts sufficient to entitle the said State of Missouri to the equitable relief prayed for in said bill of complaint."

While this language is sufficiently specific for the purposes of the demurrer, it was to be expected that counsel would, with some greater certainty, point out in their brief the respects wherein they claimed the bill to be lacking.

We gather, however, from the brief in support of the demurrer, that the following particulars are intended to be relied on.

1. On page 15 of their brief they say:

"Upon the face of the complaint the issue presented is between the State of Illinois and a corporation created by the State, and certain individuals, cities and towns in the State of Missouri; the suit is attempted to be prosecuted in the name of the State of Missouri, which has in effect loaned its name to said cities and towns and individuals; and the State is seeking redress for the supposed wrongs of such individuals, cities and towns; and it does not appear upon the face of the bill that the property rights of the State, as a State, are involved in the suit, at least not to such extent as to give this court original equitable jurisdiction."

2. On the same page, after referring to the recitals of the bill, it is said:

"From these recitals it appears that the injury threatened is to the cities and towns on the borders of the State of Missouri and their waterworks systems, and to the inhabitants on the banks of said Mississippi river, who use said waters for drinking and other domestic, manufacturing and agricultural purposes. It

is true that the bill of complaint states that the State of Missouri will be deprived of its right to the waters of said river for drinking and other purposes stated. But no fact is alleged which shows that the State of Missouri, as a State, uses water for drinking or other domestic, manufacturing or agricultural purposes. The allegation is imperfect and insufficient to show that any injury will result to the State of Missouri, as a State. The State does not drink water, the State does not carry on manufacturing or agricultural enterprises, nor does it use the water of the Mississippi river for any domestic purpose. The suit, therefore, is begun for no other purpose than the protection of the cities, towns and private individuals along the banks of the Mississippi river, in the territory of the complainant."

3. On page 26 they say:

"There are no averments in the bill of complaint in the case at bar which show that the State of Missouri will sustain any special and peculiar injury on account of the threatened action of defendants. The allegation in the complaint is that the State of Missouri and its inhabitants will be deprived of the right to the use of the waters of the said Mississippi River for drinking and other domestic, manufacturing and agricultural purposes, and that the health and the lives of the inhabitants of the State of Missouri will be endangered and the business interests of said State will be greatly and irreparably injured. This allegation is a mere conclusion of law and not a statement of facts upon which this court might conclude that such might be the result of the case complained of."

4. On page 30:

"The allegation is that this sewage, so drained into the waters of the Mississippi River, will be to the great

and irreparable damage of complainant. The injury alleged is to the inhabitants of the State of Missouri. There is no allegation setting forth facts from which this court could infer that great and irreparable damage would be done to the State of Missouri, as a State. The specific allegations of damage are to the individual inhabitants, and cities and towns and waterworks systems which these cities and towns have erected. The State of Missouri is merely lending its name to private individuals and municipalities in the State. The State has no direct, special or peculiar interest to be protected."

These matters have, to a certain extent, been already considered in connection with the questions heretofore discussed. The complaints of insufficiency thus advanced and urged, really go to the question of the State's right to maintain, in its own behalf and name, an action to restrain a public nuisance and to protect the public health, and thus, indirectly, to the question of the jurisdiction of this court.

We merely add, respecting the argument that "the State does not drink water," neither does the State become physically ill. But it yet remains to be judicially declared that because the State cannot contract bodily disease that she cannot resort to the courts to protect her people against disease. As for the suggestion that the allegation of the reults, which it is averred will inevitably follow the pollution of the water, is a mere conclusion and not a statement of fact, we beg to submit that if this objection were a valid one, then injunction can never be resorted to for the prevention of a threatened act. If it be necessary to allege actual existing facts, then the complainants would invariably have to await the happening of the nuisance, and suffer its effects. It can require no great

discernment, or power to peer into the future, to determine, without any allegation whatever, that the conclusion charged must necessarily and certainly follow the acts which are averred to be threatened.

It is also suggested, rather than argued, that no special damage to the State is pleaded. This is unnecessary in a proceeding of this nature.

In Attorney General v. Bridge Co., 21 L. R. Ch. D., 752 (1882), it was held (Syl.):

"When an illegal act is being committed, which in its nature tends to the injury of the public, such as an interference with a public highway, *or a navigable stream*, the Attorney General can maintain an action on behalf of the public to restrain the commission of the act *without adducing any evidence of actual injury to the public*, and in such a case an injunction will be granted, with costs, *although no evidence of actual injury is given*."

To the same effect, Attorney General v. Birmingham, 4 Kay & J. Rep., 528.

In Wood on Nuisances (3 Ed.), Section 442, this matter is discussed by the author, who says:

"It is no answer to an action for a nuisance arising from the pollution of water, to say that the matter discharged into the stream *improves* the water; it is the right of all persons to have the water come to them in its natural state, and they are to exercise their own taste and judgment, and are not obliged even to have their property improved against their will. If the water of the stream is polluted sufficiently to occasion *legal damage, though not damage in fact*, it is sufficient to maintain an action. By legal damage is meant a legal injury resulting from the violation of a right which is not attended with actual pecuniary damage. Therefore, when water is so far polluted as to in-

jure its primary use, *although it is not used for that purpose*, an actionable injury is created. So, when the use of water renders it injurious to health, or impairs the comfortable enjoyment of property, a nuisance is created, actionable at the suit of all persons specially injured thereby, and indictable if the stream is public or the injury common."

In support of the text, the auther cites, among other authorities, the frequently cited case of Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq., 335, from which we quote the following:

"The right of the riparian proprietor says Chancellor Kent, to the use and enjoyment of the stream of water in its natural state, is as sacred as the right to the soil itself. It is a part of the freehold, of which no man can be disseized, but by lawful judgment of his peers, or by due process of law. 2 Johns, Ch. R., 166. A disturbance or deprivation of that right is an irreparable injury, for which an injunction will issue. If the deprivation of the use of the water by diversion constitutes such an irreparable injury as will be restrained by injunction, the deprivation of its use by so corrupting it as to render it unfit for use, is an equally irreparable injury, entitling the party injured to the like preventive remedy."

PUBLIC CONVENIENCE AFFORDS NO EXCUSE FOR POLLUTION OF WATER.

In Wood on Nuisances, Section 434, the following rule is deduced from the authorities:

"The fact that the public convenience, or that the preservation of the public health even, requires that the sewage of a town shall be removed, and that there

is no other method by which it can be disposed of, except to discharge it into a running stream, will not justify its discharge there, to the injury of riparian owners. And the fact that the population of the town is large, and the number of persons to be affected by the nuisance is few, makes no difference. In the language of James, V. C., in Attorney General v. Leeds (L. R. 5 Ch. App. 589): 'The Court cannot say that the small population along the valley of the Aire, between Leeds, has not a right to prevent a nuisance from being inflicted upon them by a large and more populous district. I think they (Leeds) will find the means of removing the sewage without the danger to health that has been suggested; but, at all events, I think the people below the town have a right to say that a nuisance must not be created for them.'"

NO RIGHT TO POLLUTE NAVIGABLE WATERS CAN RESULT FROM DELAY, OR BE ACQUIRED EVEN BY PRESCRIPTION.

In Chapman v. City of Rochester, 110 N. Y., 273, plaintiff filed his bill to enjoin the defendant city from polluting, by the discharge of sewage by artificial means, a natural stream flowing through his premises. He obtained a decree, which the Court of Appeals affirmed. Among other grounds interposed by defendant why plaintiff should not have the relief prayed, it was contended that the system of sewerage complained of was the growth of many years, *completed in the course of those years, without any objection on the part of the plaintiff and at an extremely large expense to the defendant or its taxpayers within the territory drained.*" It was also urged that a decree would "*be productive of such extreme hardship and so onerous to*

the defendant, and of so little benefit to the plaintiff, it should not be required."

Exactly the arguments which are advanced in the briefs of counsel for defendants, though perhaps not pertinent to the argument on the demurrer.

The New York Court of Appeals, however, was not affected by these contentions. After referring to the case of Goldsmid v. Tunbridge Wells (1 Eq. Cas. 161, 1 Ch. App. Cas. 348), Danforth J., delivering the opinion, says:

"In view of the principle upon which this and like decisions turn, the objections of the learned counsel for defendant against the judgment appealed from are quite unimportant. The filth of the city does not naturally flow to the grounds of the plaintiff, as surface water finds its level, *but is carried thither by artificial arrangements, prepared by the city, and for which it is responsible.* Nor is the plaintiff estopped by acquiescence in the proceedings of the city in devising and carrying out its system of sewerage. The principle invoked by the appellant has no application. It does not appear that the plaintiff in any way encouraged the adoption of that system, or by any act or word, induced the city authorities to so direct the sewers that the flow from them should reach his premises. There is no finding to that effect, and the record contains no evidence. In fine, the case comes within the general rule, which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party, whether it be a natural person or a corporation who causes that pollution."

So in the case before this court, the State of Missouri did not encourage the building of this canal or ditch, nor the cutting through a natural ridge or water-

shed, nor had it, as we have already suggested, the right to protest or to proceed in the courts to prevent its construction. The canal in and of itself was not a menace to Missouri. It is the threatened act of discharging the sewage of the Sanitary District through the same and eventually into the Mississippi River, to the injury of the waters of that stream, to which in its natural condition of purity and accustomed flow the State and its people are entitled, of which the State of Missouri may and now does complain.

The canal itself was constructed entirely within the limits of the State of Illinois, and in itself is an innocent work and utterly harmless to Missouri. It is not the canal which is complained of. It is the threat of sending sewage through it into the Mississippi River which is sought to be restrained. Had this bill been filed before the canal was completed no doubt defendants would have averred that the threat charged was impossible of execution; that it could not then be carried out, and that the action, therefore, was premature.

From the reported cases it would appear that the party charged with polluting a stream invariably defends either on the ground that the action was brought too soon or that it was brought too late. As we have just seen, the defense of delay, or laches, is, as a general rule, unavailing in a case of this character. The right to maintain a public nuisance cannot be acquired by lapse of time; not even by prescription. That there may be exceptional cases arising from peculiar facts, we do not doubt; but the bill in this case, with all the facts admitted, as they are by the demurrer, discloses no such exception. Therefore, if the State of Missouri, instead of filing this bill at the moment when the defendants were in position to carry their threats into

execution, had waited and had allowed the nuisance to be begun, and had allowed it to continue, it could still have maintained this proceeding; and the intervening delay would have afforded no defense to the action nor justification for the continuance of the nuisance.

The case of Goldsmid v. Tunbridge Wells, already several times referred to, is particularly applicable upon this branch of the case.

Romilly, Master of the Rolls, in considering the question of whether acquiescence or delay will have the result which seems to be claimed for it by counsel for defendants here, said (1 Eq. Cas. 169, l. c.):

"If he (plaintiff) comes to the court and complains very early, then the evidence is that 'it (the pollution) is not perceptible,' 'it is wholly inappreciable,' and you get evidence after evidence for the defendants (the pollution being slight and perhaps only observable at some times and on some occasions) saying, 'you have no proof at all that there is any appreciable pollution and you must wait until it becomes a nuisance.' Then he waits for five or six years, until it is obvious to everybody's sense that the pollution is considerable, and then they say 'you have come too late, you have allowed this to continue on for twenty years, and we have acquired an easement over your property and the right of pouring the sewage into it.' My opinion is that any person who has a water-course flowing through his land, and sewage which is perceptible is brought into that water-course, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him."

It being also argued for the defendants that the individual must yield his rights to the public interests and convenience, the Master said:

"This is a matter of very great importance; and it has been suggested to me in argument as a matter that ought to be regarded that private interests must give way to public interests; that the court ought to regard what the advantage to the public is and that some little sacrifice ought to be made by private individuals. *I do not assent to that view of the law on the subject;* and I apprehend that the observations which were quoted to me, of Vice Chancellor, Sir William Page Wood, in the Attorney General v. The Mayor of Kingston, 13 W. R. 888, are perfectly accurate and that private rights are not to be interfered with. But my firm conviction is that in this, as in all the great dispensations and operations of nature, the interests of the individual are not only compatible with but identical with the interests of the public; and although in this case I have only to consider an injury to the private individual, the plaintiff in the present action, yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the people and the court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle and contagious diseases affecting human beings, such as cholera, and typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcly appreciable by the

most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a considerable distance. * * * I am of opinion that Mr. Goldsmid was not bound to remain quiet until this stream had become such a nuisance that it was obvious to everybody near its banks, and the result is that he is entitled to a decree for an injunction, to restrain the defendants from causing or permitting the sewage and other offensive matters from the town of Tunbridge Wells, to be discharged into the Calverley Brook, or stream, in such manner as to affect the water of the brook as it flows through the plaintiff's land."

The decree thus pronounced by the Master of the Rolls was afterwards affirmed on appeal. (1 Ch. App. Cas. 348.)

In many respects the contentions of counsel for defendants in the case at bar are identical with those advanced by counsel for the town of Tunbridge Wells. But more than that, the remarkable claim is here made, at one and the same time, that the bill is premature and that the bill is tardy. It is contended that the bill is filed too soon because, it is said, it cannot as yet be certain that the water of the Mississippi River will be polluted, through the averments of the bill are positive and unequivocal, and though it follows that the casting of the foecal matter and sewage of a population of one million five hundred thousand people into a running stream will constitute, and does constitute, a nuisance per se; and on the other hand it is urged that the bill comes too late because the State of Missouri took no early steps to prevent the construction of a canal entirely within the limits of Illinois, and the existence of which of itself, for a cen-

tury, could do no injury to the people of Missouri, and the use of which as a waterway, one of the alleged purposes of its construction, could not be complained of. And, as already suggested, there was no certainty until the canal was completed that the State of Illinois would permit its agency and subdivision, the Sanitary District, to transmit sewage through it.

Clearly the only matter of which Missouri can, or could complain, is the act of the defendants in fouling the water of the Mississippi River, and any proceeding instituted to restrain this prior to the actual attempt of defendants to accomplish it, would justly have been open to the charge of being premature.

Nor must it be overlooked that defendants have never, during the years occupied in the construction of the canal, conceded that its operation, when completed, would amount to a nuisance. The contrary has been strenuously insisted upon, as appears from the answers tendered herein, and from the arguments set forth in the briefs of counsel. It cannot, therefore, be justly charged that the complainant was guilty of laches in not earlier filing its bill, even if laches could be charged against a State.

The distance from which offensive matter comes which pollutes the running stream and causes the nuisance is immaterial. Wood on Nuisances (3 Ed.), Sec. 436. Nor does it avail the defendants to emphasize the expensiveness of the canal through which the sewage is passed. The expensiveness or the extensiveness of that which creates a nuisance is no reason for staying the hand of a court of equity. Wood on Nuisances (3 Ed.), Sec. 802, p. 1183.

It is urged that this case is without a precedent; that no such bill has ever been filed here before. This, however, by no means warrants the suggestion that

the question involved is a novel one. Cases of this kind, as we have shown, have often arisen, and the State has uniformly been allowed to prosecute, as its own, a proceeding to enjoin a public nuisance. The only novelty, therefore, if novelty it can be called, in this case, lies in the fact that this is the first time that a State has been compelled to apply to this court to abate the pollution of a stream in the water of which it is interested, by defendants beyond its own jurisdiction. The ordinary rules of law, so fully established in other similar cases, are fully applicable here. The only novelty, then, is to be found in the fact that a sovereign State is compelled to apply to this court for relief, for nowhere else can she obtain it.

But if this case were a new one, no difficulty should be apprehended by reason thereof. If no precedents existed this case should be made a precedent. The practice of polluting running streams, the waters of which men are compelled to drink, and to rely upon, is a savage and a barbarous practice, which should no longer be tolerated in this advanced age. In all the more civilized communities sewage is disposed of by more modern methods than that which is now proposed to be adopted by these defendants.

The rules of equity readily adapt themselves to new situations, and there will be no difficulty to their adapting themselves to this. Sherwood, J., in commenting upon this feature of equity jurisprudence, in the case of Lampert v. Haydel, 96 Mo. 449, l. c., after referring to the case of Tullett v. Armstrong, 4 My. & C. 393, says:

"That case affords a striking illustration of what Judge Story so eloquently observes: 'The beautiful character, prevading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and propor-

tions so as to meet the very form and pressure of each particular case in all its complex habitudes.' 1 Story Eq. Jur. Sec. 439. And Lord Cottenham frequently laid down the rule that it was the duty of a court of equity to 'adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which * * * must continually arise; and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy.'"

IN CONCLUSION.

We have now discussed all of the questions presented by the demurrer, and, we fear, following the example of our opponents, some that are not thus presented. The question of laches, for example, cannot properly be in the case at this stage. Nevertheless, the matter having been discussed in the briefs submitted on behalf of the defendants, we were not quite willing to ignore them altogether. Upon the two propositions which are properly in the case, the original jurisdiction of this court and the sufficiency of the averments of the bill, taking them to be true (as they must be taken for the purposes of the present discussion), there can be no reasonable room for doubt. This court has jurisdiction and the facts pleaded justify a decree. Whether these facts can be substantiated hereafter is another matter altogether.

The appeal, which is made by the defendants upon the ground that the Sanitary Canal has involved an expenditure of upwards of $34,000,000.00, and that this vast expenditure "is but a bagatelle, compared with

the incalculable benefit which will be enjoyed by the people of Chicago and Cook County, for all time to come," scarcely needs reply. A nuisance cannot become legal because its production and creation involve great outlay; nor will the injury to the people of Missouri be overlooked because of the "incalculable benefit" which the people of a part of Illinois might possibly be enabled to enjoy, provided the peope of Missouri suffer.

The demurrer should be overruled.

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